UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JAMES WILLIAM CASSELMAN and	)	CASE NO. 02-30154 HCD
LYNN ROSA CASSELMAN,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
RICHARD SEEMAN,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 02-3015
	)	
LYNN ROSA SEEMAN,	)	
	)	
DEFENDANT.	)	

Appearances:

Gordon E. Gouveia, Esq., attorney for plaintiff, 433 West 84th Drive, Merrillville, Indiana 46410; and

Lynn Rosa Casselman, pro se, 22026 North 73rd Avenue, Glendale, Arizona 85310.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 25, 2003.

Before the court is the "Complaint Under 11 U.S.C. § 523(a)(15)" filed by the plaintiff Richard Seeman ("plaintiff") against his former spouse Lynn Rosa Seeman, now known as Lynn Rosa Seeman-Casselman or Lynn Rosa Casselman ("defendant" or "debtor"). The defendant answered the complaint on March 26, 2002, generally denying the allegations, but never responded to the court's Scheduling Order of March 28, 2002, or to the plaintiff's Request for Admissions. When the court ordered the plaintiff to show cause why the matter should not be dismissed for lack of prosecution, he filed a Motion for Summary Judgment. The defendant did not respond to the motion. For the reasons that follow, the court grants the plaintiff's motion for summary judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On February 12, 1999, a Decree of Dissolution was entered in Jasper Superior Court, dissolving the marriage of Lynn Rosa Seeman and Richard Seeman. The decree, which adopted the property settlement agreement between the parties, awarded the defendant a 1998 Nomad Skyline Trailer and a 1993 Ford van and required her to hold the plaintiff harmless on the debts remaining for the vehicles. *See* R. 1, Ex. A. On January 10, 2002, the defendant (now known as Lynn Rosa Seeman-Casselman or Lynn Rosa Casselman) filed a chapter 7 voluntary petition jointly with James William Casselman.

The plaintiff filed his complaint against his former spouse on March 1, 2002. *See* R. 1. According to the complaint, the defendant was obligated to pay $15,300 to NBD Bank for the trailer. Because the defendant failed to pay the debt and to hold him harmless, the plaintiff reported, NBD Bank was pursuing him for the debt and the attorney's fees generated by it. The plaintiff asked that the court declare nondischargeable, under 11 U.S.C. § 523(a)(15), the debt of $15,300, plus the amounts already paid by the plaintiff, any deficiency on the sale of the trailer, and costs and fees.

The defendant answered the complaint on March 26, 2002, generally denying the allegations. *See* R. 5. The court's Scheduling Order of March 28, 2002, required the parties to make their disclosures (as set forth in Federal Rule of Civil Procedure 26(a)), their pre-trial order, and a pre-trial conference on scheduled dates. The court granted the plaintiff an extension of time to complete discovery after he reported to the court that he had not received the defendant's initial disclosures. *See* R. 9, Order of May 29, 2002. However, by its Order of September 12, 2002, the court ordered the plaintiff to show cause why the matter should not be dismissed for lack of prosecution. The plaintiff responded on October 4, 2002, with a Motion for Summary Judgment. The motion stated that, on May 22, 2002, the plaintiff served upon the defendant a Request for Admissions, and the defendant failed to answer it. It asserted that there is no genuine issue of material fact and asked that summary judgment be granted. The debtor and the trustee were served with the motion. The debtor filed no response. The court now takes the matter under advisement.

Discussion

The issue in this case is whether the debtor's obligation to the plaintiff is excepted from her discharge under 11 U.S.C. § 523(a)(15). Section 523(a)(15) provides that an individual debtor is not discharged from any debt –

> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless –
>
> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
> >
> > (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15). "This section is intended to cover divorce-related debts such as those in property settlement agreements that 'should not justifiably be discharged.'" *In re Crosswhite*, 148 F.3d 879, 882 (7th Cir. 1998) (quoting 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 523.21 (15th ed. rev. 1998)). The plaintiff has the initial burden of proving that he holds a subsection (15) claim against the debtor, and then the burden shifts to the debtor to prove that she falls within either of the two exceptions found in § 523(a)(15)(A) and (B). *See id.* at 884.

The dischargeability issue is presented to the court in the form of a plaintiff's Motion for Summary Judgment on his complaint – a motion to which the defendant did not respond. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. *See Anderson*, 477 U.S. at 248. "To avoid summary judgment . . . the nonmoving party [is] required to set forth 'specific facts showing that there is a genuine issue for trial,' Fed. R. Civ P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position." *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than relying solely on the allegations or denials in its pleadings. *See Barber v. United States* (*In re Barber*), 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L. B. R. B-7056-1. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Just as the case law and federal rules underscore the requirement that a nonmoving party present some evidence to demonstrate that there are triable issues before the court, Rule B-7056-1 of the Local Rules of the United States Bankruptcy Court for the Northern District of Indiana requires a nonmovant's response.

> . . . Any party opposing the motion [for summary judgment] shall, within thirty (30) days of the date the motion is served upon it, serve and file a "Statement of Genuine Issues" setting forth all material facts as to which it is contended there exists a genuine issue, supported with appropriate citations to discovery responses, affidavits, depositions or other admissible evidence, together with any affidavits or other documentary material controverting the movant's position. The "Statement of Genuine Issues" may either be filed separately or as a part of the responsive brief. . . . .

N.D. Ind. L.B.R. B-7056-1; *see Barber*, 236 B.R. at 663 (citing earlier local rule and Seventh Circuit case law supporting trial court's discretion concerning strictness of the rule). Under this local rule, "if a summary judgment respondent fails to file a timely statement of disputed material facts, uncontroverted statements in the moving party's statement in support of summary judgment are deemed admitted." *Barber*, 236 B.R. at 663 (citing *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 412 (7th Cir. 1997)). Indeed, courts generally treat all material facts as admitted when no response is filed and the facts are thereby uncontroverted. *See, e.g., West v. Grindstaff* (*In re Grindstaff*), 254 B.R. 706, 708 (Bankr. S.D. Ohio 2000); *Novartis Corp. v. Luppino* (*In re Luppino*) 221 B.R. 693, 696 (Bankr. S.D. N.Y. 1998).

The court finds that the defendant's failure to respond to the plaintiff's motion for summary judgment is also a failure to comply with the local bankruptcy rule and federal rules. It determines, therefore, that the material facts set forth by the plaintiff, being uncontroverted by the defendant, are admitted. Among the facts deemed admitted are these:

1. The defendant has failed to pay the debt to NBD Bank and to hold the plaintiff harmless.

2. The plaintiff has incurred and continues to incur costs as a result of the defendant's failure to hold him harmless for the debt on the 1998 Nomad Trailer pursuant to the divorce decree dated February 12, 1999.

3. The defendant has admitted the matters contained in the plaintiff's Request for Admissions, which include:

> (A) The defendant has made no payments on the trailer since February 12, 1999.

(B) The defendant has failed to comply with the divorce decree.

(C) The debt specified in the dissolution decree to be paid by the defendant, the 1998 Nomad Trailer, is a non-dischargeable debt as defined under 11 U.S.C. § 523(a)(15).

The court further finds that, because the defendant has declined to set forth specific facts indicating that there is a genuine issue for trial, the court must grant summary judgment to the plaintiff.

This court does not grant the movant's motion for summary judgment based solely on the lack of response by the nonmovant, however. It also finds that the plaintiff properly discharged his initial burden by demonstrating that no genuine issue of material fact is in dispute. The debt indisputably arose from a property settlement award incurred in the course of the divorce proceeding; it was not a debt for support or maintenance that fell under § 523(a)(5). Because the debt constitutes a § 523(a)(15) property settlement obligation, it is excepted from discharge "*unless*, under (A), the debtor does not have the ability to pay the debt from disposable income, or, under (B), the benefit to the debtor in discharging the debt outweighs the detrimental consequences to the debtor's former spouse . . . ." *In re Crosswhite*, 148 F.3d 879, 883 (7th Cir. 1998). The burden thus shifted to the debtor to establish either of the exceptions to nondischargeability contained in subsections (A) and (B). *See id.* at 884-85; *Turner v. McClain (In re McClain)*, 227 B.R. 881, 885 (Bankr. S.D. Ind. 1998). She was required to demonstrate, with more than mere allegations or denials, that the debt should be discharged from her bankruptcy because either (A) or (B) applied to her. *See In re McClain*, 227 B.R. at 885 (citing *Crosswhite*). The debtor, by not responding, failed to meet her burden. The court finds that the defendant has failed to demonstrate that she lacks the ability to make payments on the property settlement debt, under § 523(a)(15)(A), or that the benefit of discharging this debt outweighs the detrimental consequences to the plaintiff, under § 523(a)(15)(B).

The court determines that the plaintiff's allegations, in light of the uncontroverted material facts, are sufficient to show as a matter of law that the debt the defendant was required by the Jasper Superior Court to pay, under the Decree of Dissolution, is excepted from discharge in the debtor's bankruptcy under

11 U.S.C. § 523(a)(15). The court notes that NBD Bank holds a security interest in the trailer in the amount of $15,300, and that the plaintiff has paid $3,300.56 to the Bank. The court finds that the debt, in the amounts owed to the Bank and to the plaintiff, is not dischargeable in the debtor's bankruptcy.

Although attorney's fees are not authorized under § 523(a)(15) and therefore are dischargeable in a debtor's bankruptcy,[1] Rule 7054(b) provides that, in adversary proceedings, a bankruptcy "court may allow costs to the prevailing party except when a statute . . . or these rules otherwise provides." As the Ninth Circuit has pointed out, "Unlike the principle that attorney's fees cannot be awarded, there is no bankruptcy law policy against the granting of costs to a prevailing party for expenses in litigating federal law questions in a bankruptcy proceeding." *Renfrew v. Draper*, 232 F.3d 688, 695 (9th Cir. 2000); *see also Moore v. Fletcher (In re Northern Indiana Oil Co.)*, 192 F.2d 139, 142 (7th Cir. 1951) (stating that in bankruptcy court, which is a court of equity, a prevailing party is *prima facie* entitled to costs).

Costs are not awarded "as of course," but rather at the court's discretion. *See In re Jodoin*, 196 B.R. 845, 856 (Bankr. E.D. Cal. 1996) (awarding costs in a § 523(a)(15) proceeding), *aff'd*, 209 B.R. 132 (9th Cir. B.A.P. 1997). The defendant has given the court no reason not to grant costs. The court therefore finds that it is appropriate to award costs to the plaintiff as the prevailing party. *See, e.g., Jenkins v. Sroufe (In re Sroufe)*, 261 B.R. 35, 40 (Bankr. D. Idaho 2001); *Helsel v. Marsh (In re Marsh)*, 257 B.R. 879, 883 (Bankr. W.D. Tenn. 2000). The plaintiff is entitled to the costs reasonably incurred in this proceeding. Pursuant to the

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[1] The case law makes clear that there is no specific statutory authority for an award of fees under 11 U.S.C. § 523(a)(15). *See Renfrew v. Draper*, 232 F.3d 688, 696 (9th Cir. 2000) ("Because the issues presented in § 523(a)(15)(A)-(B) are purely federal, no attorney's fees may be awarded by a bankruptcy court for litigating these questions."); *Helsel v. Marsh (In re Marsh)*, 257 B.R. 879, 883 (Bankr. W.D. Tenn 2000) (following *Renfrew*, granting partial award of attorney's fees because plaintiff was forced to answer debtor's denial of liability on underlying debt); *Dennison v. Hammond (In re Hammond)*, 236 B.R. 751, 769 (Bankr. D. Utah 1998) (denying fee award because § 523(a)(15) "does not specifically provide that the prevailing party will be awarded attorneys fees"); *Collins v. Florez (In re Florez)*, 191 B.R. 112, 116 (Bankr. N.D. Ill. 1995) (following American rule, denying fee request; finding that "[l]itigation under Section 523(a)(15) should not be encouraged by loading attorney fees on the underlying nondischargeable debt, thereby further impeding the Debtor's fresh start").

court's local rule, the plaintiff is directed to file a request for the taxation of costs within thirty (30) days from the entry of this final judgment. *See* N.D. Ind. L.B.R. B-7054-1.

Conclusion

For the reasons discussed above, the court grants in part and denies in part the Motion for Summary Judgment filed by the plaintiff Richard Seeman pursuant to 11 U.S.C. § 523(a)(15). Finding that the facts set forth by the plaintiff are uncontested by the defendant debtor Lynn Rosa Seeman, now known as Lynn Rosa Casselman or Lynn Rosa Seeman-Casselman, the court deems those facts to be true. The court determines that, as a matter of law, the property award debt for the 1998 Nomad Skyline Trailer that the Jasper Superior Court ordered the defendant to pay in its Decree of Dissolution of February 12, 1999, is excepted from discharge in the debtor's bankruptcy.

The plaintiff's request for attorney's fees under § 523(a)(15) is denied. However, the court grants to the plaintiff an award of costs reasonably incurred in litigating this adversary proceeding. The plaintiff is directed to file a request for the taxation of costs within thirty (30) days from the entry of this final decision. *See* N.D. Ind. L.B.R. B-7054-1.

SO ORDERED.

JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT